

EPA

Environmental Appeals Board Practice





General Information

- EAB is the final Agency decision maker on administrative appeals under all major statutes EPA administers
 - Conference with Administrator in federal agency cases
- Permanent body consisting of four “impartial” Environmental Appeals Judges appointed by the Administrator
- Sits in panels of three judges
- Makes decisions by majority vote
- Counsel to the Board/Clerk of the Board

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EAB Jurisdiction

- Established primarily by regulation
 - Appeals from administrative enforcement decisions & select appeals from permit decisions- 40 CFR Part 22
 - Appeals from permit decisions - 40 CFR Part 124
 - CERCLA cost reimbursement petitions - delegated from EPA Administrator
 - Appeals under other statutory & regulatory authorities
- EAB follows Federal Rules of Civil Procedure for guidance in interpreting its jurisdiction & informing its practice

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Scope & Standard of Review

- Scope of Review – limited to issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction
- Standard of Review – EAB generally reviews both factual and legal conclusions of the Presiding Officer (i.e., ALJ) *de novo*
- “Preponderance of the Evidence” standard applies

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Appealing Enforcement Decisions

General Information

- Governed by 40 CFR Part 22 (CROP)
- CROP defines EAB role as “[r]ul[ing] on appeals from initial decisions, rulings and orders of a Presiding Officer”
- EAB has discretion to resolve procedural issues not addressed in the CROP

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Appealing Enforcement Decisions

- Any party may appeal Presiding Officer's initial decision; EAB may also initiate review on its own initiative
- “Initial decision” is a term of art under the CROP that equates to a final decision by the Presiding Officer that resolves all outstanding issues
- Deadline – 30 days from service of decision; generally applied strictly; address for filing varies depending on delivery system chosen

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Appealing Enforcement Decisions

Appeals Procedure - Initial Decision (cont.)

- Form and Content – Section 22.5 (c)
 - No specific form; should be accompanied by brief
 - Section 22.30 (a) governs contents of brief
 - » Table of Contents/Authorities
 - » Statement of Issues
 - » Statement of Nature of Case/Relevant Facts
 - » Argument on Issues Presented
 - » Conclusion
 - Additional requirements for briefs over 20 pages (See Section 22.5 (c)(2))



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Appealing Enforcement Decisions

Appeals Procedure - Interlocutory Appeal

- Governed by Section 22.29
- Initiated by motion to Presiding Officer requesting certification of order/ruling for EAB review
- Deadline – 10 days from service of order/ruling
- If certification denied by Presiding Officer, moving party may appeal denial to EAB w/in 10 days of refusal to certify

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Appealing Enforcement Decisions

Appeals Procedure - Interlocutory Appeal

- EAB will accept certified interlocutory appeal if
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 - Ruling involves important question of law or policy concerning which there are substantial grounds for difference of opinion
 - Immediate ruling will advance the proceeding
 - Review after final order is issued will be inadequate/ineffective

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Appealing Enforcement Decisions

Appeals Procedure - Interlocutory Appeal

- After accepting appeal, EAB must act on it within 30 days or appeal will be automatically dismissed
- EAB is not required to issue a substantive ruling within 30 days
- Typically, if EAB intends to review a certified interlocutory appeal it will –
 - Issue an order to that effect within 30 days
 - Provide a schedule for briefs/oral argument

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Appealing Enforcement Decisions

Appeals Procedure - Oral Argument

- No right to oral argument before the EAB; Board will hear oral argument in appropriate cases
- Scheduled at request of a party or on EAB's own motion where it determines that oral argument would assist it in its decision-making
- Oral arguments take place in Washington DC at EPA HQ or by videoconference at the Board's discretion
- Oral argument schedule available on EAB website

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EAB Decisions

- Published in Environmental Administrative Decisions (E.A.D.)
- Available electronically on the EAB website at www.epa.gov/eab/new.htm and from commercial sources (e.g., LEXIS, WESTLAW, ELR)
- E.A.D. also contains selected opinions issued by EPA Administrator, Chief Judicial Officers, and Judicial Officers before creation of EAB – not available electronically; can be obtained from Clerk of the Board and some commercial sources
- Some orders are unpublished

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References

- General Information (Including FAQs) – available at www.epa.gov/eab or from Clerk of the Board at (202) 501-7060
- 40 CFR Part 22 – Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (CROP) (See also 64 Federal Register 40138 (July 23, 1999) for history and background of CROP revision)
- Environmental Appeals Board Practice Manual – available at www.epa.gov/eab/pmanual.pdf

